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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 553

IN THE MATTER

of

The Petition of MORAN TRANSPORTATION CORPORATION, as owner of the "MORAN No. 96", her tackle, apparel, etc., in a cause of limitation of, or exoneration from, liability.

MORAN TRANSPORTATION CORPORATION,
Petitioner,

v.

ADMINISTRATRIX OF VITTORIO MELLINO,
Respondent-Claimant,

and

TODD SHIPYARDS CORPORATION,
Claimant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD ASH,
SIDNEY A. SCHWARTZ,
Proctors for Petitioner.

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Moran Transportation Corporation, respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled matter on November 21, 1950.

Opinions Below

The initial opinion of the District Court (R. 38-40) is reported in 75 F. Supp. 392.

The second opinion of the District Court (R. 68) is unreported.

The opinion of the United States Court of Appeals (R. 76-80) is reported in 185 F. (2d) 386.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 21, 1950 (R. 81). The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254 (1).

Question Presented

Can one of two claimants in a limitation of liability proceeding in admiralty, by its unaccepted promise to grant the other claimant a priority in payment when distribution is made of the res, deprive the ship owner, the petitioner in the limitation proceeding, of its right to have a single trial as to its liability to each and both of the claimants and, if liable, to limitation of said liability and thereby force the shipowner to a piecemeal adjudication of its total liability, both within and without the limitation proceeding.

Statutes and General Admiralty Rules Involved

The pertinent statutory provisions and the General Admiralty Rules promulgated by the Supreme Court of the United States are printed in Appendix A, *infra*, pp. 13-22.

Statement

On or about October 16, 1947, the petitioner herein, as owner of the dump scow "Moran 96," filed a petition in the admiralty for limitation of, or exoneration from, liability under and pursuant to 46 U. S. C. A. § 183, *et seq.* and General Admiralty Rules 51, *et seq.*, with respect to an occurrence allegedly happening on petitioner's dump scow, "Moran 96," on or about February 26, 1947, while said scow was in navigable waters in Brooklyn (R. 4-8). As the petition shows, the occurrence was the alleged opening downward of bottom or dump doors at a certain pocket or hatch of the scow by reason of which it is claimed one Vittorio Mellino, an employee of the American Stevedores, Inc., a stevedoring firm, working aboard the scow, fell into the water and sustained personal injuries resulting in his death (R. 5).

As an initial step in this limitation proceeding, the petitioner filed an ad interim stipulation in the amount of $31,055, which was approved by order of District Judge Rayfiel, said order being dated October 16, 1947 (R. 12-13). A restraining order, in the usual form, submitted upon the filing of the petition herein, was signed by District Judge Rayfiel on October 16, 1947 (R. 9-11) and provided for a stay of any and all suits arising out of the occurrence of February 26, 1947 (R. 11).

Santina Mellino's suit in the Supreme Court of the State of New York, Kings County, as administratrix of the estate of Vittorio Mellino, against the petitioner herein, as defendant therein, which was instituted some two months before the limitation proceeding, was thereby stayed. By motion thereafter (R. 19), said administratrix sought to modify the restraining order before the return day of the monition, and District Judge Byers in an opinion of January 14, 1948 (R. 38-40), reported in 75 F. Supp. 392, granted the modification, imposing certain conditions to

be fulfilled by the administratrix, which were complied with on or about the date of the entry of an order (R. 45-46) based upon District Judge Byers' decision. However, said relief was granted upon the stated premise of District Judge Byers that this was to be deemed a *one* claim limitation proceeding (R. 38).

The claim filed by Santina Mellino, as administratrix (the filing of said claim being one of the conditions imposed by Judge Byers in the order of January 20, 1948), was for $100,000 (R. 41-42).

In September of 1949, Todd Shipyards Corporation instituted a proceeding in the admiralty (U. S. D. C., S. D. N. Y., Adm. 162-138) against American Stevedores, Inc., and Moran Transportation Co. Inc., the owner of the "Moran 96" (the corporation intended to be sued being Moran Transportation Corporation, petitioner herein), for damages sustained by Todd Shipyards Corporation in clearing the slip of the concrete ballast which came out of the pocket of the "Moran 96" on February 26, 1947 when the dump doors of said scow allegedly opened, as heretofore outlined (R. 48-49). Upon being advised of the instant limitation proceeding, Todd Shipyards Corporations, hereafter referred to as Todd, moved in this proceeding (R. 47) for an order granting it leave in this proceeding to file its claim for damages and to answer the petition. There being no appearance on the part of anyone, *including* the administratrix, in opposition to the relief sought by Todd an order was signed by District Judge Inch on November 2, 1949 granting Todd leave to file its claim and answer (R. 50).

A claim of Todd in the amount of $1,611 (R. 54-55) and an answer (R. 51-53), denying petitioner's right to exoneration or limitation, being received by the proctors for the petitioner on December 1, 1949, a motion for reinstatement of the original restraining order was made by the petitioner herein (R. 56-60).

The respondent, Mellino, in opposition to said motion, suggested certain conditions being imposed upon a denial of the motion, viz., that the respondent file a formal consent that the claim of Todd, to be fixed by the court, be first deducted and paid out of any available fund before any judgment obtained by the respondent, Mellino, in the state court be paid, if, in this limitation proceeding, the petitioner be granted limitation of liability.

This completely unilateral offer was neither accepted by the claimant, Todd Shipyards Corporation nor the petitioner and Todd's claim and answer have not been withdrawn in the limitation proceeding, thus leaving for trial (a) Mellino's cause of action against the petitioner in the state court; (b) petitioner's right to limitation in the federal court in the event of a judgment in Mellino's favor against the petitioner after a trial in the state court; (c) the value of petitioner's vessel; (d) the validity of Todd's claim and its right to recover in the limitation proceeding, and (e) the amount of Todd's claim.

The District Judge denied petitioner's motion for reinstatement of the original restraining order and held that this limitation proceeding was preserved as a one-claim proceeding by the proffer of the respondent, Mellino, respecting a priority in payment of Todd's claim.

The United States Court of Appeals for the Second Circuit adopted said reasoning and affirmed the order of the District Court. In passing, the Court below indicated (R. 80, footnote 7) that there were intimations in *Hartford Accident & Ind. Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 216, respecting a shipowner's advantages under the Limitation of Liability Act contrary to those enunciated in its present opinion.

Reasons for Granting the Writ

1. This petition presents for determination important issues in the administration of admiralty law, as embodied in the Limitation of Liability Act, R. S. 4285, as amended 49 Stat. 1480, 46 U. S. C. § 185, and General Admiralty Rules 51-54, as amended by the Supreme Court of the United States, June 21, 1948. By the decision of the United States Court of Appeals, for the Second Circuit, in this matter, a shipowner, invoking the benefits of the aforesaid Act and complying with the Rules, promulgated by this Court (Appendix A, *infra,* pp. 16-22) is subjected to litigation inside and outside of the limitation proceeding. By its decision, one of two claimants in a limitation proceeding, where the aggregate amount of the claims, as filed, *exceeds* the res, is entitled to have a trial by jury in a state court as to the negligence of the shipowner-petitioner and the shipowner is subjected to another trial of its negligence to the other claimant either within the limitation proceeding or in any forum to which the latter claimant wishes to go.

After two trials as to its negligence with respect to two different claimants, in two different forums, the shipowner-petitioner must try its right to limit in the limitation proceeding—thereby having been subjected to three trials.

Subjection of a shipowner to litigation dehors a limitation of liability proceeding has only been allowed in true one-claim cases, as determined by the Supreme Court of the United States in the cognate cases of *Langnes* v. *Green,* 282 U. S. 531 and *Ex Parte Green,* 286 U. S. 437.

The device suggested by the respondent, Mellino, does not make this proceeding a one-claim proceeding—this, for the reason that the second claimant, Todd Shipyards Corporation, must adduce evidence in its trial of the negligence of the ship-owner and the latter must adduce evidence, probably of the same tenor as that adduced upon the trial involving Mellino, to prove the petitioner's non-

liability to Todd Shipyards Corporation. Obviously, the determination of a ship-owner's liability to one claimant in one forum is not *res judicata* of its liability to another claimant in another forum.

If one of two claimants can offer to grant a priority to the other claimant in the distribution of the res and thereby proceed outside of the limitation proceeding, although said offer is not accepted by the other claimant nor is the latter's claim and answer in the proceeding withdrawn, then one of the primary purposes of the limitation proceeding, *i.e.*, a concourse of claims in one proceeding, is rendered nugatory. Such a drastic result, if it is to be the law, should be settled by this Court embracing, as it does, the interpretation of a federal statute and its administration under and by the General Admiralty Rules.

Further, any attempt to confine decision to a two-claim limitation proceeding is to fly in the face of an appreciation that "the radiating potencies of a decision may go beyond the actual holding." *Hawks* v. *Hamill,* 288 U. S. 52. There can be no tenable reason why one of several claimants in a limitation proceeding, no matter how many claims are embraced in a proceeding, cannot offer the same proposal and obtain a separate trial in any forum, dehors the limitation proceeding.

2. The decision of the court below is believed to be erroneous and is in conflict with the principle that a limitation proceeding has as one of its primary purposes a forum concursus as clearly set forth in *The Scotland,* 105 U. S. 24, 33; *Providence & N. Y. S. S. Co.* v. *Hill Manufacturing Co.,* 109 U. S. 578, 594 to 596; *Hartford Acc. & Ind. Co.* v. *Southern Pac. Co.,* 273 U. S. 207, 216; *Black Diamond S. S. Corp.* v. *Robert Stewart & Sons,* 336 U. S. 386, 393.

The court below appreciated that its decision, which did not compel a liquidation of the amount of the respondent's claim in the limitation proceeding, was contrary to the principles enunciated by this Court in *Hartford Acci-*

dent & Ind. Co. v. *Southern Pacific Co.*, 273 U. S. 207, for it forthrightly says so in footnote 7 of its opinion (R. 80—p. 389 of 185 F. 2d.).

Not only is the opinion of the court below a subtle erosion of a statutory purpose, gathered from the integration of the Rules into the Statute (Appendix, *infra*), but the same is an outright repudiation of well-settled principles of maritime law, oft-fingered by this Court. Thus, in *Providence & N. Y. S. S. Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578, this Court said (p. 594):

> "In promulgating the rules referred to this court expressed its deliberate judgment as to the proper mode of proceeding on the part of ship-owners for the purpose of having their rights under the act declared and settled by the definitive decree of a competent court, which should be binding on all parties interested, and protect the shipowners from being harassed by litigation in other tribunals. Unless *some proceeding of this kind* were adopted which *should bring all the parties interested into one litigation, and all the claimants into concourse* for a *pro rata* distribution of the common fund, it is manifest, that in most cases the benefits of the act could never be realized." (Italics supplied.)

* * * * *

(And at p. 595):

> "But the very object of proceedings for limited liability is to inquire and determine whether the parties ought to be sued at all in any other tribunal after giving up, or submitting to pay the value of, all their interests in the ship and freight. Besides, it is obvious on the face of the thing that proceedings for limited liability cannot be participated in by two jurisdictions without interference and conflict between them, and cannot have any useful effect if a different

court may inquire into and decide the same question, and execute a separate judgment independent of and perhaps contrary to that of the court to which the inquiry properly belongs. Such a state of things would utterly defeat the purpose of the law. The judgment in one court would annul or render nugatory that of the other.

The inconveniences that may arise from preventing or arresting the prosecution of separate suits by the claimants are no greater in this case than in the case where proceedings at law are arrested for the purpose of having an investigation in a court of equity, or where distinct and separate suits are restrained for the purpose of settling a common controversy in a single proceeding, as in the case of bills for preventing a multiplicity of suits, and in cases of bankruptcy." (Italics supplied.)

It is fundamental learning that a limitation proceeding "partakes in a way of the features of a bill to enjoin the multiplicity of suits" and "looks to a complete and just disposition of a many-cornered controversy." *Hartford Accident & Indemnity Co.* v. *Southern Pac. Co.*, 273 U. S. 207, 216. As the Court said (p. 217 of 273 U. S.):

> "The court of admiralty, in working out its jurisdiction, *acquires the right to marshal all claims,* whether of strictly admiralty origin or not, and to give effect to them by the apportionment of the res and by judgment in personam against the owners so far as the court may decree." (Italics supplied.)

This is still the view of this Court as expressed in *Black Diamond S. S. Corp.* v. *Robert Stewart & Sons*, 336 U. S. 386, 393:

> "* * * But where, as here, the total amount of potential claims exceeds the fund available for their satisfaction, * * * *there exists just a situation as R. S. § 4285 was designed to meet.*" (Italics supplied.)

The question presented by this petition has never been decided by, and should be settled by, this Court. The holding of the court below and the rationalization of said court permeates every limitation proceeding instituted under the Federal statute in question.

3. Although this is not a final decision (the same having been appealable to the U. S. Court of Appeals under its decisions of *W. E. Hedger Transp. Corp.* v. *Gallotta,* 145 F. 2d. 870; *Curtis Bay Towing Co.* v. *Tug Kevin Moran,* 159 F. 2d. 273, construing former § 227 of Title 28, U. S. Code, now § 1292 (1) of Title 28, U. S. Code), the question posed in this petition is fundamental to the further conduct of the case. *United States* v. *General Motors Corp.,* 323 U. S. 373, 377; *Land* v. *Dollar,* 330 U. S. 731, 734, footnote 2; *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U. S. 682, 685, footnote 3.

Patently, if petitioner had to wait until a final decree were entered in the limitation proceeding, disposing of petitioner's right to limit, should the respondent herein be successful in the state court, petitioner at that juncture would have been subjected to two trials respecting its negligence, as to (a) the respondent and (b) Todd Shipyards Corporation, in two different forums, and the question herein posed as to the right to proceed outside of the limitation proceeding would be academic.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD ASH,
SIDNEY A. SCHWARTZ,
Proctors for Petitioner.

New York, New York, Feb. 7, 1951.

Statutes

46 U. S. C. A. §183:

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: Provided, that there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsections (b), (c), (d) and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title. (As amended Aug. 29, 1935, c. 804, § 1, 49 Stat. 960; June 5, 1936, c. 521, § 1, 49 Stat. 1479.)

* * * * * * * *

46 U. S. C. A. §184:

"Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the

purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto. (R. S. § 4284; Feb. 27, 1877, c. 69, § 1, 19 Stat. 251.)"

* * * * * * * *

46 U. S. C. A. §185:

"The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease. (As amended June 5, 1936, c. 521, § 3, 49 Stat. 1480.)"

General Admiralty Rule 51

LIMITATION OF LIABILITY—HOW CLAIMED

The owner or owners of any vessel who shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the Act of March 3, 1851, entitled "An Act to limit the liability of shipowners and for other purposes" (Sections 183 to 189 of Title 46 of the U. S. Code, 46 U. S. C. A. §§ 183-189) as now or hereafter amended or supplemented, may file a petition in the proper District Court of the United States, as hereinafter specified. Such petition shall set forth the facts and circumstances on which limitation of liability is claimed and pray proper relief in that behalf. It shall also state facts showing that the petition is filed in the proper district; the voyage on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort arising on that voyage so far as known to the petitioner, and what suits, if any, are pending thereon; whether the vessel was damaged, lost or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If any of the above particulars are not fully known to the petitioner, a statement of such particulars according to the best knowledge, information, and belief of the petitioner shall be sufficient. With his petition the petitioner may, if he so elects, file an interim stipulation, with sufficient sureties or an approved corporate surety, for the payment into court whenever the court shall so order, of the aggregate amount of the value of petitioner's interest in the vessel at the close of the voyage or, in case of wreck, the value of the wreckage, strippings or proceeds, and of any pending freight recovered or recoverable with interest at six percent per

annum from the date of the stipulation and costs. If such interim stipulation is filed, it shall be accompanied by an affidavit or affidavits of a competent person or persons corroborating the statement in the petition as to value of the vessel, or her wreckage, etc., and her freight. Said court, having caused due appraisement to be had of the value of petitioner's interest in the vessel, or her wreckage, etc., and her freight shall make an order for the payment of the same into court, or for the giving of a stipulation, with sufficient sureties or an approved corporate surety, for the payment thereof into court with interest at six percent per annum from the date of the stipulation, whether interim or final, and costs, whenever the same shall be ordered; or, if the petitioner shall so elect, the court without such appraisement shall make an order for the transfer by the petitioner of his interest in such vessel, or her wreckage, etc., and freight to a trustee to be appointed by the court under the fourth section of said Act.

If a surrender of petitioner's interest in the vessel or her wreckage, etc., is offered to be made to a trustee, the petition must further show any prior paramount liens thereon, and what voyage or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

Upon the filing of such interim stipulation, or upon determination of value by appraisal and compliance with the court's order with respect thereto, or upon compliance with a surrender order, as the case may be, the court shall issue a monition against all persons asserting claims in respect to which the petition seeks limitation, citing them to file their respective claims with the Clerk of said court and to serve on or mail to the proctors for the petitioner a copy thereof on or before a date to be named in said writ

which shall be not less than 30 days after issuance of the same, which time the court, for cause shown, may enlarge.

* * * * * * * *

(Form of notice of monition and method of service omitted.)

The said court shall also, on the application of the petitioner, make an order to restrain the further prosecution of all and any suit or suits against the petitioner and/or said vessel in respect to any claim or claims subject to limitation in the proceeding. Amended June 21, 1948.

General Admiralty Rule 52

FILING AND PROOF OF CLAIM IN LIMITED LIABILITY PROCEEDINGS

Claims shall be filed with the Clerk of the Court in writing under oath and a copy shall be served upon the proctor for the petitioner on or before the return day of the monition. Each claim shall specify the various allegations of fact upon which the claimant relies in support of his claim, the items thereof, and the dates on which the same accrued. Within thirty days after the return day of the monition or within such time as the Court thereafter may allow, the petitioner shall mail to the proctor for each claimant (or if the claimant have no proctor to the claimant himself) a list setting forth (a) the name of each claimant, (b) the name and address of his proctor or attorney (if he is known to have one), (c) the nature of his claim, i.e., whether property loss, property damage, death, personal injury, etc., and (d) the amount thereof.

Whenever an interim stipulation has been filed as provided in Rule 51, any person claiming damages as aforesaid, who shall have filed his claim under oath may file an exception controverting the value of the vessel, at the close of the voyage, or, in case of wreck the value of her wreckage, strippings or proceeds, and the amount of her pending freight, and the amount of the interim stipulation based thereon, and thereupon the court shall cause due appraisement to be had of the value of petitioner's interest in the vessel, or her wreckage, etc., and her freight; and if the court finds that the amount of the interim stipulation is either insufficient or excessive, the court shall make an order for the payment of the proper amount into court or, as the case may be, for a reduction in the amount of the stipulation or for the giving of an additional stipulation.

Proof of all claims which shall be filed in pursuance of said monition shall thereafter be made before a commis-

sioner to be designated by the court, or before the court as the court may determine, subject to the right of any person interested to question or controvert the same; but no objection to any claim need be filed by any party to the proceedings; and on the completion of said proofs, the commissioner shall make report, or the court its findings on the claims so proven, and on confirmation of said commissioner's report, after hearing any exceptions thereto, or on such finding by the court, the moneys paid or secured to be paid into court as aforesaid or the proceeds of said vessel, or her wreckage, etc., and freight (after payment of costs and expenses) shall upon determination of liability be divided pro rata, subject to all provisions of law thereto, appertaining, amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled. Amended June 21, 1948.

General Admiralty Rule 53

RIGHTS OF OWNER TO CONTEST LIABILITY AND OF CLAIMANTS TO CONTEST EXONERATION FROM LIABILITY OR LIMITATION OF LIABILITY OF OWNER

In the proceedings aforesaid, the petitioner shall be at liberty to contest his liability, or the liability of said vessel, provided he shall have complied with the requirements of Rule 51 and shall also have given a bond for costs and provided that in his petition he shall state the facts and circumstances by reason of which exoneration from liability is claimed; and any person claiming damages as aforesaid who shall have filed his claim under oath and intends to contest the right to exoneration or limitation, shall file an answer to such petition, and serve a copy on proctor for petitioner, and may contest the right of the owner or owners of said vessel, either to an exoneration from liability or to a limitation of liability under the said Act of Congress, or both, provided such answer shall in suitable allegations state the facts and circumstances by reason of which liability is claimed or right to limitation should be denied. Amended June 21, 1948.

General Admiralty Rule 54

COURTS HAVING COGNIZANCE OF LIMITED LIABILITY PROCEDURE

The said petition shall be filed and the said proceedings had in any District Court of the United States in which said vessel has been libeled to answer for any claim in respect to which the petitioner seeks to limit liability; or, if the said vessel has not been libeled, then in the District Court for any district in which the owner has been sued in respect to any such claim. When the said vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the said owner, the said proceedings may be had in the District Court of the district in which the said vessel may be, but if said vessel is not within any district and no suit has been commenced in any district, then the petition may be filed in any District Court. The District Court may, in its discretion, transfer the proceedings to any district for the convenience of the parties. If the vessel shall have already been sold, the proceeds shall represent the same for the purposes of these rules. Amended June 21, 1948.

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BRIEF OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 553

In the Matter of the Petition

of

MORAN TRANSPORTATION CORPORATION, as owner of the "MORAN No. 96", her tackle, apparel, etc., in a cause of limitation of, or exoneration from, liability.

MORAN TRANSPORTATION CORPORATION,
Petitioner,

v.

ADMINISTRATRIX OF VITTORIO MELLINO,
Respondent-Claimant,

and

TODD SHIPYARDS CORPORATION,
Claimant.

BRIEF OF RESPONDENT

Statement

Petitioner seeks certiorari from a decision of the Court of Appeals, Second Circuit, the Court consisting of Chief Judge Learned Hand and Circuit Judges Swan and Frank.

Jurisdiction

Petitioner concedes that the order appealed from is not a final decision. It seeks certiorari nevertheless upon the contention that the question here posed is "fundamental to the further conduct of the case." This latter language extracted from the decisions in *United States* v. *General Motors Corp.*, 323 U. S. 373, 377; *Land* v. *Dollar*, 330 U. S. 731, 734, footnote 2; and *Larson* v. *Domestic & Foreign Commercial Corp.*, 337 U. S. 682, 685, footnote 3, has little or no application to the facts in this case. What petitioner apparently means by this argument is that it would be inconvenient if it were compelled to await final decree in the limitation proceeding before taking this appeal.

But this Court has held that even hardship imposed on parties who are compelled to await the correction of an alleged error at an interlocutory stage by an appeal from a final judgment does not necessarily justify resort to certiorari or other of the extraordinary writs in aid of appellate jurisdiction as a means of review at the interlocutory stage. *U. S. Alkali Export Asso.* v. *United States*, 325 U. S. 196.

A case may not be brought to the Supreme Court by an appeal or writ of error in fragments but to be appealable must be not only final but complete. *Collins* v. *Miller*, 252 U. S. 364; *Oneida Nav. Corp.* v. *Jeb & Co.*, 252 U. S. 521.

Moreover, the order here appealed from was in exercise of the District Court's discretionary power. *Petition of Red Star Barge Line, Inc.*, 160 F. 2d 436; *The Helen L.*, 109 F. 2d 884.

As such it is not appealable save on some extraordinary showing of abuse of discretion. On the contrary, the Court of Appeals in the instant case (185 F. 2d 386, p. 389) said:

> "It would be inequitable and an abuse of discretion *to invoke* the Statute to deprive appellee of trial by jury. * * *." (Italics ours.)

The Question Presented

Properly stated, the issue here is whether the rather belated filing of a second claim in a limitation of liability proceeding *compels* an injunction against prosecution of original claimant's state court action despite her consent to give priority in payment to the second claimant in the event limitation is granted. Or, to put it rather bluntly, can respondent be deprived of a forum of her own choosing, which gives her a jury trial, by the mere filing of this belated additional claim?

Ever since *Langnes* v. *Green*, 282 U. S. 531 and *Ex parte Green*, 286 U. S. 437, it has been established that, so long as the claimant does not challenge the privilege of limitation, the shipowner may not draw an action against him into the admiralty court, where there is only a single claim, even though it be greater than the value of the vessel.

Respondent here has complied with the conditions laid down in *Petition of Red Star Barge Line*, 160 F. 2d 436 (135-138). In addition, respondent has conceded the value of petitioner's scow and tackle at $31,055 (130-132).

Respondent has further stipulated that in the event petitioner is successful in the limitation proceeding, the new claimant, Todd Shipbuilding Corp., be paid first out of the available fund (211-213).

The effect of this stipulation, in the view of the District Court, is to preserve this proceeding as a one-claim limitation. In view of which, petitioner's motion to reinstate an injunction against respondent's proceeding with her state court action was denied (202-203).

It is respondent's position that the admiralty court need not draw respondent's state court action into its forum because, on the record here, the fund made available by the shipowner is adequate for the payment of all claims, in the event that limitation is allowed, and no concourse of claims is necessary in view of that fact.

The total claims exceed the fund here only nominally. If the limitation is allowed and respondent's judgment in her state court action exceeds the amount of the fund no one but the respondent will suffer thereby. She will, in such event, receive what is left of the fund after the Todd claim, as fixed by the admiralty court, has been paid. She has consented to this in advance. Obviously, this does not make the fund inadequate in the sense that a concourse of claims becomes necessary.

As the Court of Appeals pointed out in its opinion, "since Todd's claim is bound to be paid in full, the fund is inadequate solely with respect to the single claim of appellee (respondent here). Practically, then, the situation is the equivalent of that in *Red Star Barge Line.* In the circumstances, it would be inequitable, and an abuse of discretion, to invoke the statute to deprive appellee of trial by jury or to compel her to liquidate the face amount of her claim in a forum she did not choose" (R. p. 80).

The principle that a limitation proceeding has as one of its primary purposes a forum concursus is indisputably correct but the principle applies only where a concourse is required by reason of the inadequacy of the fund. This is made quite clear by the decisions cited on page 7 of petitioner's brief.

In *Providence & N. Y. S. S. Co.* v. *Hill Manufacturing Co.,* 109 U. S. 578, the Court discussed at some length the general purposes of the statute and indicated its necessity for the protection of shipowners. Petitioner quotes two passages from the opinion in that case on pages 8 and 9 of its brief. But it omits the following language which occurs in the opinion, on page 595, between the two cited passages:

> " * * * whilst in the ordinary cases, where a limited liability to some extent exists, *but to an amount less than the aggregate claims for damages, so as to require a concourse of claimants and a pro rata distribution,* the prosecution of separate suits if allowed to proceed, would result in a subversion of the whole object and scheme of the statute" (italics ours).

Thus this Court long ago pointed out the cases which the Statute was intended for, namely those in which an inadequate fund made a concourse of claims necessary.

In the *Scotland,* 105 U. S. 24, this Court merely reaffirmed the necessity of the proceeding to enable shipowners to bring into concourse the various parties claiming damages.

In *Black Diamond S. S. Corp.* v. *Robert Stewart & Sons,* 336 U. S. 386, the C. C. A. (2d) had affirmed a dismissal of a limitation proceeding because the claims did not exceed the value of the ship, citing *Curtis Bay Towing Co.* v. *Tug Kevin Moran,* 159 F. 2d 273; *The Acquitania,* 20 F. 2d 457; and *The Geo. W. Fields,* 237 F. 403. This Court agreed that these cases "hold that where the aggregate claims against a shipowner can by no possibility exceed the value of his ship, a proceeding under R. S. Sec. 4285 will not lie." But it was pointed out that there was a question as to whether the amount of the limitation was to be fixed by the law of Belgium or the United States, and since under the Belgian law the fund deposited was inadequate to cover all claims

> "* * * there exists just such a situation as R. S. Sec. 4285 was designed to meet."

It is only this latter point in this opinion that petitioner cites on page 9 of its brief.

Obviously, as the Court stated on page 393 of that opinion, where the fund is ample there is no reason for permitting the invocation of a forum concursus.

Indeed the language of the fourth section of the statute (now 46 U. S. C. A. 184) makes clear the intent of Congress that it be applicable only where the fund is inadequate and a concourse necessary. As the Court of Appeals pointed out in its opinion the statute "says that, when loss is suffered by several persons, 'and the whole value of the vessel, and her freight for the voyage, *is not sufficient to make compensation to each of them,* they shall receive compensation * * * *in proportion to their respective losses,*' and that

the limitation proceedings are 'for the purpose of apportioning tne sum * * * among the parties entitled thereto'" (italics in C. C. A. opinion) (R. pp. 79-80).

In the instant case, the respondent having consented to pay the only other claimant in full, obviously there is no need for concourse, because the only one that may suffer is respondent. The fund therefore, for all practical purposes, is ample.

Petitioner urges that the court below, in its decision, recognized that it was going contrary to the decision of this Court in *Hartford Accident & Ind. Co.* v. *Southern Pacific Co.*, 273 U. S. 207. The reference is to a footnote in the C. C. A. opinion (R. 80) which pointed out that the privilege of limiting liability is not part of any doctrine of *forum non conveniens* and that a shipowner sued in several places by several persons has no advantage over other persons in the same position, citing *Curtis Bay Towing Co.* v. *Tug Kevin Moran*, 159 F. 2d 273, 276. The opinion went on to state that "there were perhaps contrary intimations in Hartford Accident Co. v. Southern Pacific 273 U. S. 207, 216."

The question there was only as to a litigant being compelled to liquidate her claim in a forum not of her choosing. But, as the court below went on to say in the same footnote, claimant in that case had begun its suit in admiralty and thus was not being deprived of a right to go to the state court. In the subsequent *Green* cases, the claimant had sued in the state court, as here, and was permitted to continue there.

It is perhaps interesting to observe that in the *Hartford* case the shipowner was urging that claimant should be compelled to go to a state court and claimant was insisting that since it had started in the admiralty court, it should be permitted to proceed there even after limitation was disallowed.

It would seem to be clear that there is nothing in the decision below in conflict with the principles expressed in the *Hartford* case.

Adopting petitioner's argument there seems to be something dogmatic and inflexible in the invoking of the statute at the mere appearance of a second claim. No such rigidity exists. It is urged by petitioner that the decision below would lead to a multiplicity of actions—that it would require two trials. Judge Augustus N. Hand in *The Acquitania,* 14 F. 2d 456, disposed of that contention when he held that the limitation statute:

> "must be primarily founded not upon the avoidance of a multiplicity of actions, but a possibility at least that the liability of the owner may exceed the value of the vessel and her pending freight."

On the appeal in that case, 20 F. 2d 457, the Court stated:

> "The statute is intended to limit the liability of the shipowner but not arbitrarily to give him a particular forum."

To the same effect, *Curtis Bay Towing Co.* v. *Kevin Moran, supra.*

Conclusion

The petition presents no new question requiring decision by this Court. The point involved has been settled as long ago as *Langnes* v. *Green* and *Ex parte Green* and as recently as *Black Diamond S. S. Corp.* v. *Stewart, supra.*

The petition should be denied.

Respectfully submitted,

JACQUIN FRANK,
Counsel for Respondent.